1986

S.M. Horman v. S. Spence Clark : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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S. M. HORMAN, a general partner for HORMAN CONSTRUCTION COMPANY, a Utah partnership, and S. M. HORMAN, JR.,

Plaintiffs and Appellant,

v.

S. SPENCE CLARK, as general partner for VALLEY SHOPPING CENTER ASSOCIATES, a Utah limited partnership,

Defendant and Respondent.

860068-CA
Case No. 20239

BRIEF OF RESPONDENT S. SPENCE CLARK

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HONORABLE BRYANT H. CROFT, JUDGE, DISMISSING APPELLANT'S COMPLAINT NO CAUSE OF ACTION

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STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Did the trial court err in concluding, on the facts of this case, that Clark had no implied contractual duty to ensure the Hormans' continued use and enjoyment of the parking rights received under the contract which Clark had fully performed?

II. Under the facts of this case, did the trial court correctly determine that Clark, the grantor of an interest in real property to Hormans, was not an insurer of Hormans' duty to record?

STATEMENT OF THE CASE

This is an appeal from a September 11, 1984 judgment rendered after trial to the Honorable Bryant H. Croft of the Third Judicial District Court wherein he found that Appellants ("Hormans") had no cause of action against Respondent ("Clark") for breach of a written contract to convey parking privileges to Hormans.

STATEMENT OF FACTS

This suit arose out of an agreement between Clark and the Hormans, who owned adjacent property, by which Clark conveyed to Hormans parking rights on his property. The Hormans failed to record that conveyance in a timely manner, and their parking rights were extinguished when Clark later conveyed the underlying parcel. Both Hormans and Clark have been involved extensively in the real estate industry for several decades, involving hundreds of real estate transactions. Trial Transcript 13-14 and 139-40.

1. 1975 Agreement.

In 1975, Hormans and Clark owned adjoining parcels of real estate, zoned for commercial use, located at approximately 4500 South State Street in Salt Lake City, Utah (hereinafter referred to respectively as the "Horman Property" and the "Clark Property"). Findings of Fact, Record at 466. By Agreement dated July 7, 1975 Hormans and Clark mutually agreed to convey a portion of their properties to Murray City for the construction of a road which would provide additional access to each property. (This Agreement shall hereinafter be referred to as the "Agreement".) As part of the Agreement Clark agreed to

> permit Hormans or their assigns with parking privileges for Hormans or Hormans' invitees or assigns to park on the parking lot in the rear of the Valley Shopping Center [Clark's property] in any of the stalls which are used for public parking.[1]

Findings of Fact 2-7, Record at 466-67; see also Exhibit 6-P. The Agreement contained no other language imposing recordation or other post-conveyance duties upon Clark.

2. The 1978 Recordation Of The Agreement.

The format of the Agreement complied with Utah's recording statutes and was a recordable document. Duplicate originals of the document were executed and each party kept one original. Findings

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[1] The Agreement was signed by Horman in September of 1975 and by Clark in March of 1976, but was dated July 5, 1975. Thus, the Agreement was effective and all rights thereunder conveyed on July 7, 1975.

of Fact 10 and 12, Record at 468. The Agreement was not recorded until January 12, 1978 when S.M. Horman, upon determining that it had never been recorded, took his copy to the Salt Lake County Recorder's Office and recorded it. Findings of Fact 13, Record at 468. The uncontradicted expert testimony at trial showed that the custom and practice in Utah is that the grantee of an interest in property bears the burden of recording that interest so as to give notice of his interest to others. Trial Transcript 307.

3. <u>1977 Sale By Clark Of Underlying Parcel.</u>

On March 15, 1977, prior to the time the Agreement was recorded, Clark agreed to convey his property to W. Meeks Wirthlin and his wife in a six-party real estate exchange agreement ("Exchange Agreement"). The Exchange Agreement provided that the Clark property would be conveyed subject to "encroachments, easements and restrictions of record". Exhibit 9-P. Pursuant to the Exchange Agreement, Clark provided a warranty deed conveying the property to the Wirthlins and a preliminary title report prepared by Associated Title Company showing good and marketable title in Clark. The warranty deed provided that the property was subject to

> easements, covenants, restrictions, rights of way, encroachments and reservations appearing of record or enforceable in law or equity.

Findings of Fact 14, 15 and 16, Record at 468-49, <u>see also</u>, Exhibit 10-P. No mention of the Agreement was made in the title report because Hormans had not yet recorded it. Findings of Fact 16, Record at 469. The title company handling the real estate exchange recorded the warranty deed to the Wirthlins on March 15, 1977, approximately one year before Hormans recorded the Agreement. Findings of Fact 18, Record at 469.

Because the Wirthlins and their transferee, the Grandale Finlayson Family Trust, took the property without notice of Hormans' interest, they were bona fide purchasers for value, and they obtained fee interest in the property unencumbered by Hormans' parking interest. Findings of Fact 19, Record at 469; <u>see also</u>, Appellant's Brief 9.

4. <u>Hormans' Subsequent Development of Their Property</u>.

On or about July 1, 1980, S.M. Horman, Jr. obtained a building permit for a strip shopping center on the Hormans' property. The building permit was obtained from Murray City upon the representation that Hormans possessed a right to park on the adjacent property formerly owned by Clark. When it was learned that Hormans did not have the right to park on the Clark Property, Murray City reduced the amount of permitted occupiable space in the strip mall. Findings of Fact 26, 27, 31 and 33, Record at 470-472.

5. <u>Judicial Proceedings.</u>

Horman brought suit against Clark and others for lost profits and other damages resulting from the reduced occupancy. The suit was based initially on claims of fraud, breach of an oral contract, unjust enrichment, and breach of a written contract. Record at 2-6, 65-66, 76-83, 111-112. At the time of trial, Clark was the only remaining defendant and the only remaining claim was breach of the written Agreement. Record at 363-66, 372-73.

After reviewing all of the evidence presented at trial, the Honorable Bryant H. Croft, as the trier of fact, entered a Memorandum Opinion holding that Hormans had no cause of action against Clark for breach of the written agreement to convey parking privileges. Record at 462.

SUMMARY OF ARGUMENT

The Agreement grants to Hormans the right "to park on the parking lot in the rear of the Valley Shopping Center in any of the stalls which are used for public parking", a right conveyed to Hormans by Clark and enjoyed by Hormans from 1975 until March 1977 when the Wirthlins recorded their fee interest in the property. By granting Hormans the parking privileges, Clark fulfilled every express obligation of the contract.

The implied duties for which Hormans contend -- a duty of good faith dealing, a duty not to interfere with property rights, a duty not to repudiate a contract, and a duty not to make performance impossible -- are duties intended to assure the completion of the contract. However, this contract was completed once Clark granted Hormans the parking interest at which time all duties, whether express or implied, were satisfied. Clark did not have a continuing contractual duty to protect the benefits or property interest received by Hormans from subsequent defeasance. That duty, whether characterized as a duty to record or otherwise, rested with Hormans and arose at the time they received the interest.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT CLARK HAD NO CONTINUING IMPLIED CONTRACTUAL DUTIES TO HORMANS ONCE HE COMPLETED THE CONTRACT BY GRANTING HORMANS THE PARKING PRIVILEGE.

Hormans' tried the case on a single cause of action in the Fourth Amended Complaint for breach of the written Agreement. In that Fourth Amended Complaint, Hormans specifically allege that Clark breached the Agreement in two ways:

> 1) Defendant failed to disclose the existence of the agreement . . . to the new purchasers and failed to list the interest of the plaintiffs on the Warranty Deed conveying the property to the said third party purchasers.
>
> 2) Defendant 'interfere[ed] with the parking rights previously granted to Plaintiffs.'

Fourth Amended Complaint ¶ 6, Record at 364.

The Agreement grants to Hormans the right "to park on the parking lot in the rear of the Valley Shopping Center in any of the stalls which are used for public parking."[2] Hormans admit this parking right was granted to them in complete compliance with the terms of the Agreement:

> Such property right was a valid property interest <u>and properly conveyed to plaintiffs</u> by written document dated and signed on the 7th of July, 1975.

Record at 396 (emphasis added); <u>see</u> <u>also</u>, Fourth Amended Complaint, ¶ 3. Record at 363-64, Thus, Hormans possessed and enjoyed this

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[2] Horman contends that the Parking Agreement constitutes an easement rather than a revocable license. Appellant's Brief 7-9.

Record at 396 (emphasis added); see also, Fourth Amended Complaint, ¶ 3. Record at 363-64, Thus, Hormans possessed and enjoyed this parking privilege from the date of the Agreement until March 1977, when the purchasers of the shopping center received and recorded their fee interest to the underlying shopping center land.

Since Clark completed the contract by performing every express term of the Parking Agreement, Hormans necessarily seek to impose liability on Clark by implying covenants in the Agreement regarding Clark's duties after performance of that contract.

A. The Existence Of Implied Terms In A Contract Is An Issue Of Law.

The interpretation or construction of a contract is a question of law. E.g., Morris v. Mountain States Telephone & Telegraph Company, 658 P.2d 1199, 1200 (Utah 1983). Thus, whether the Agreement contains the implied terms or duties for which Hormans contend is a question of law as applied to the facts which the trial court found.

B. Implied Contractual Duties Or Conditions Are Not Favored In Law.

Implied conditions are not favored in the law, e.g.,

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[2] Continued: However, the basis for the trial court's decision made it unnecessary to resolve this issue. Record at 473-75. As correctly argued in Appellant's Brief, whether an agreement creates an easement or a revocable license depends on the parties' intent, and intent is a question of fact. It would thus be inappropriate for this Court to rule that the agreement created an easement, as requested by Appellant, which issue should be remanded for a factual determination of the parties' intent in the event of a reversal of the trial court's decision. Compare, Trial Transcript 21 with, Trial Transcript 121-22.

Fuller Market Basket, Inc. v. Gillingham & Jones, Inc., 14 Wash. App. 128, 539 P.2d 868, 872 (1975), particularly when the implied term would result in a breach, e.g., Smith v. Long, 40 Colo. App. 531, 578 P.2d 232, 235 (1978). Thus,

> [b]ecause of the reluctance of courts to tamper with parties' written contracts, certain conditions have been imposed before a court will imply a covenant. These conditions have been summarized as:
>
> (1) The implication must arise from the language used . . .; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered in the contract.

Walgreen Arizona Drug Co. v. Plaza Center Corp., 132 Ariz. 512, 647 P.2d 643, 646 (1982); accord, Brown v. Safeway Stores, Inc., 94 Wash.2d 354, 617 P.2d 704, 710-11 (1980).

C. There Was No Implied Contractual Duty To List The Parking Agreement In A Warranty Deed Or To Disclose It To Subsequent Purchasers.

No duty or covenant for Clark to list specifically the existence of the Agreement in his Warranty Deed for the entire shopping center property or to disclose its existence to subsequent purchasers can be implied in the Agreement for several reasons.

First, there is no express language in the Agreement from which such "implication must arise". See Walgreen Arizona Drug Co. v. Plaza Center Corp., supra. Moreover, it does not "appear from the language used [in the Agreement] that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express" Clark's purported duty to disclose the Agreement to subsequent purchasers of the shopping center property. There is simply nothing in the language or meaning of the Agreement to suggest the implied duties for which Hormans argue.

Second, there is no legal necessity here for the asserted implied duties. As discussed below, the recording statutes as well as custom and practice in Utah assign such duties to the buyer or recipient, see Utah Code Ann. § 57-1-6 (1953); Trial Transcript 307, and if Hormans had recorded, disclosure by Clark to the Wirthlins would have been meaningless. Hormans argue for such duties by raising the spectre of fraudulent reconveyances of the same property. However, that argument fails because this case does not involve such a duplicate conveyance and because such fraudulent reconveyances are protected against by the tort laws.[3] Indeed, Hormans seek a judicial rescue from their own recording failure by asking the court to write new terms and duties into its contract. But it is well settled that contracts should not be rewritten by courts to include terms addressed to such possibilities.[4]

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[3] Horman stipulated to the dismissal of the claims based upon fraud, unjust enrichment and breach of an oral contract. Record at 372-73; compare Fourth Amended Complaint, Record at 363-366, with Third amended Complaint, Record at 111-12.

[4] Courts should not rewrite contracts more favorable to one party than those contracts the parties themselves agree upon. "A court will not enforce asserted rights that are not supported by the contract itself." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

Third, there is simply no statutory or case law authority supporting the implied terms for which Hormans contend. That paucity of precedent is due to the radical departure of Hormans' contention: Even the covenants implied in warranty deeds do not extend as far as the duties Hormans seek to impose upon Clark. See Utah Code Ann. § 57-1-12 (1953). Here the parties used a written agreement with no warranties; Hormans simply received the parking rights for which they bargained.

D. Any Implied Duty Not To Interfere With The Performance of a Contract Does Not Extend To The Facts Of This Case.

Similarly, the alleged implied duty to deal in good faith or not to interfere with Horman's parking rights must be analyzed in terms of its proposed application in this case. Hormans argue that Clark's "obligation of fair dealing and good faith resulted in the obligation of permitting Horman parking privileges". Appellant's Brief 12. But Hormans admit that Clark fully conveyed the parking privileges. Fourth Amended Complaint ¶ 3, Record at 363-64 Thus, Clark met Hormans' test of good faith when he granted fully the parking rights.

The only "interference" which Hormans really allege is that, after fully granting the parking rights to Hormans, Clark conveyed the underlying land to a third party. Hormans call that transfer an "interference" because it indirectly resulted in Hormans' loss of the parking rights, a loss resulting because the Agreement was not recorded. Thus, Hormans' theory would require Clark or any seller, before he could transfer fee simple to property, to check or ensure that any lesser interest in the land was recorded. There is simply no authority for such a revolutionary shift of burdens in real estate conveyances in this state. *See* Trial Transcript 306-09 and 312.

Hormans attempt to muster supporting case law authority, but none of their cases applies factually or legally. Hormans primarily, if not exclusively, rely on cases dealing with a party who *fails to complete performance of a contract* by voluntarily making his performance impossible.[5] Those cases would apply here only if Clark had not conveyed the parking rights in the first place. However, where, as here, the interest was fully conveyed and the buyer thereafter asserts an implied, continuing duty on the seller to record the interest or to specifically disclose it to a subsequent third party purchaser, the cited cases have no relevant teaching.

In a separate effort to overcome the adverse law, Hormans try to recast the case by characterizing Clark's position as follows:

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[5] The nine cases cited by Hormans which turn on a failure of initial performance are: *Tanner v. Baadsgaard*, 612 P.2d 345 (Utah *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979); *Dillon v. Morgan*, 362 So. 1130 (La. App. 1978); *Mohr v. Sears*, 239 Or. 41, 395 P.2d 117 (1964). *Cannon v. Stevens School of Business, Inc.*, 560 P.2d 1381 (Utah 1977); *Marlowe Investment Corp. v. Radmall*, 26 Utah 2d 124, 1980); 485 P.2d 1402 (1971); *Thompson v. Thompson*, 1 Wash. App. 196, 460 P.2d 679 (1969); *Zogarts v. Smith*, 86 Cal. App. 2d 165, 194 P.2d 143 (1948); *Pacific Venture Corp. v. Huey*, 15 Cal.2d 711, 104 P.2d 641 (1940).

> Respondent now argues that . . . Appellant's failure to record voided the contract, thereby enabling him to sell the property to another party.

Appellant's Brief, 13. This "strawman" argument misstates Clark's position. Clark contends that Hormans' failure to record the Agreement ultimately resulted in an extinguishment of their parking right, but did not void the Agreement with Clark because that Agreement had already been completed and fully performed. The Agreement is not void even though the parking right was lost by Hormans.

Hormans also argue that Clark is precluded from transferring the same interest or "granting two conflicting interests." Appellent's Brief, 12 and 15. However, Clark clearly did not sell the <u>same</u> property or the <u>same</u> interest successively nor did he grant two conflicting interests. In 1977, Clark sold the underlying shopping center parcel; he did not sell the same parking rights he granted to Hormans. The situation where two successive sales of <u>identical</u> property are made is dramatically different, since such duplicate sales are inherently inconsistent. In such a case, defrauded buyers may have a claim for fraud. Here, however, and in a multitude of real property transactions, the grant of a lesser estate such as the parking right and the later conveyance of the underlying parcel are neither inconsistent nor conflicting. Indeed, under Hormans' theory of conflicting transfers, a property owner should never convey his property if he had previously granted a lesser interest, such as an easement or license or lease.

The case of Pearson v. Shadix, 237 Ga. 817, 229 S.E.2d 653 (Ga. 1976), cited by Hormans is not relevant for precisely this reason. That Pearson case involved a boundary dispute between two lot owners in a subdivision where their respective deeds granted overlapping land. The Georgia court held for the lot owner who received his deed first, noting the developer "cannot thereafter convey legal title to the same land to another grantee." Id. at 654 (emphasis added). The instant case does not involve conveyances of fee simple to two identical pieces of land. Indeed, but for Hormans' failure to record, there was and is nothing inconsistent or conflicting in separately granting an easement and then later conveying the underlying property.

The weakness of Hormans' argument can be seen by examining the case of Johnson v. Bell, 666 P.2d 308 (Utah 1983), which Hormans proclaim to be "excellent authority for [their] position." Appellant's Brief, 15. In Johnson, plaintiffs sought to quiet title to certain property or to recover damages against the Bells. In 1966, Mr. Bell executed an installment contract with plaintiffs' predecessors in interest and also gave to them a quitclaim deed on an adjoining 80 acres. In 1967, plaintiffs redeemed the 80 acres from a tax sale. On September 9, 1974, the Bells executed a trust deed to Murray First Thrift on the 80 acres. Two weeks later the plaintiffs for the first time recorded the 1966 quitclaim deed to the 80 acres. Id. at 309.

Even though the same land had been conveyed twice, the Supreme Court rejected plaintiffs claims for damages against the

Bells because the "quitclaim deed carried [no] warranty of title" and because "plaintiffs had no contractual relationship with the Bells and no contractual liability is present". Id. at 312. Hormans' arguments from the Johnson case fail on two grounds. First, Hormans mischaracterize the holding in Johnson when they state that:

> The Court recognized a contractual cause of action between the original grantor and the original grantee. It is this contractual cause of action upon which Plaintiffs' claim is based.

Appellants' Brief, 15. The Court in Johnson only held that:

> If any cause of action for damages exists against Bell because of breach of some contractual duty, such cause of action would be owned by the original grantees and not by plaintiffs.

Johnson at 666 P.2d at 312 (emphasis added). Thus, the Johnson Court explicitly did not recognize any such cause of action, such a holding not being necessary. Second, and more importantly, the Johnson case involved the crucially different fact of a double conveyance of the same property -- and not, as here, conveyance of different and non-conflicting property interests.

II. CLARK HAD NO DUTY, CONTRACTUAL OR OTHERWISE, TO ENSURE THAT HORMANS WOULD RECORD THE PARKING AGREEMENT.

Hormans' argument depends on a mischaracterization of the trial court's conclusion of law that Hormans' failure to record relieved Clark of any contractual obligations. Appellants' Brief, 9-10. However, the trial court held that the contractual duties sought to be imposed on Clark by Hormans do not exist, and recognized the protective effect the recording statutes would have afforded Hormans had they recorded the Agreement. The Court did not relieve Clark of any contractual duties because all relevant duties had been performed.

Notice to subsequent purchasers is given by the recording statute. Utah Code Ann. § 57-1-6 (1953). Any implied duty to record is on the buyer - the Hormans in this case. "[P]arties who contract on subject matter concerning which known usages prevail incorporate into the agreement such implications if nothing is said to the contrary." Engle v. First National Bank of Chugwater, 590 P.2d 826, 831 (Wyo. 1979). The unquestioned practice concerning recording is that "the recipient of an instrument of conveyance . . . takes it to the office of the proper recording agency" to be recorded. 6A Powell on Real Property 82-35 (1984); This practice was recognized as early as 1833 and has not been questioned since. Adams v. Cuddy, 30 Mass. 460 (1833). The expert testimony at trial was that in Utah the grantee of an interest records. Trial Transcript 307.

Hormans lost their parking interest because they failed to record. They cannot escape this loss by attempting to create a wholly new implied contractual duty on Clark. Cf. Engle v. First National Bank of Chugwater, 590 P.2d at 830. Since the law assumes that grantees will record their interests in real property, and the custom and practice in Utah is for grantees to record interests in real property, Clark had a right to assume that Hormans had recorded their interest. The obligation for which Hormans argue would dramatically change the custom and practice in Utah (see

Record at 798-800), and impose on vendors of real property not only the burden of monitoring forever any interests or potential interests in numerous properties even though the vendor's only promise was to convey a certain interest, but would make the vendor an insurer against the recipient's failure to record.

CONCLUSION

There is no basis in law or under the facts of this case for the requested and radical rule of law shifting from Hormans to Clark the responsibility for continued protection of the benefits received by Hormans in full compliance with the Agreement. Contract law should not be altered to provide Hormans such additional protections not agreed to by the parties, particularly when the potential evils decried by Hormans are protected against by the laws of fraud and tort. Thus, the September 11, 1984 Judgment of Judge Croft should be affirmed.[7]

DATED this 7th day of May 1985.

Craig Carlile

James S. Jardine
Craig Carlile
Attorneys for Respondent

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[7] Appellants request this Court to order the "Trial Court to enter a money judgment in favor of the Appellants based upon the evidence at trial". Appellants' Brief 2. The evidence of damages is in sharp conflict. *Compare*, Trial Transcript, 156-159 *with* Trial Transcript 323-27 *and* Trial Transcript 371-82. Before any money judgment could be entered, the trial court would first have to find that Appellants suffered a loss which could not have been mitigated. Thus, if this Court finds some error in the trial court's findings or conclusions, remand is the proper remedy in view of the evidentiary issues which would then remain.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 1985, four copies of the foregoing Respondent's Brief were mailed, postage prepaid, in the United States mails to Raymond A. Hintze, 4685 Highland Drive, Suite 202, Salt Lake City, Utah 84117.

Craig Carlile

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ADDENDUM

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

S. M. HORMAN, as General Partner for Horman Construction Co., a Utah Partnership and S. M. Horman, Jr., Plaintiffs, vs. S. SPENCE CLARK, as General Partner for Valley Shopping Center Associates, a Utah Partnership, Defendants.	MEMORANDUM DECISION CIVIL NO. C-81-2129

This case came on for trial before the Court on July 9, and 10, 1984 with Raymond A. Hintze appearing as counsel for plaintiff, and James S. Jardine appearing as counsel for defendant. At the conclusion of the trial the Court took its decision under advisement and having considered the same, now renders its decision thereon.

The case was filed on March 16, 1981 and was tried upon the issues arising out of the Fourth Amended Complaint filed February 24, 1984, upon facts which may be summarized as follows:

Plaintiffs were owners of a tract of land lying north of and continguous to the Valley Shopping Center owned by defendant and located at the northeast corner of the intersection of 4500 South and

Copies mailed to counsel 7/25/84.
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State Streets in Murray, Utah. Defendant had acquired the shoppin center from Horman in about 1970. The tract of land owned by plaintiffs was vacant property being held by plaintiffs for future development.

Being desirous of obtaining a break in the traffic control island along State Street to afford access to the center by southbound traffic, the defendant determined that it could do so only by dedicating land for construction of a road from State Stre eastward to Fairbourne Avenue. Defendant thus commenced negotiati with Horman for a conveyance of a portion of their respective parcels of land to Murray City for construction of said roadway. These negotiations culminated in the execution of an agreement between plaintiff and defendant dated July 5, 1975, but which was not signed by S. M. Horman for the Construction Company until September, 1975, and was not signed by defendant until March, 1976 Both signatures were acknowledged before a notary public.

The agreement provided that Horman would deed to Murray City the south 35 feet of its parcel of land running east and west for about 460 feet and that defendant would deed to Murray City the north 15 feet of its shopping center land from State Street to Fairbourne Street; that defendant would obtain a deed from American Motors to Murray City of the south 35 feet of its propert fronting on State Street and contiguous to Horman's parcel on the west, (about 150 feet in length) and that Horman would not be required to pave the street. The agreement also contained the following provision:

> It is understood between both parties hereto that Property Management and/or Valley Shopping Center Assoc. will permit Horman or its assigns with parking privileges for Horman or Horman invitees or assigns to park on the parking lot in the rear of the Valley Shopping Center in any of the stalls which are used for public parking.

The agreement contained a legal description of the shopping center property.

Both parties had a signed and notarized copy of the agreement. However, upon final execution of the agreement neither party had the agreement recorded in the County Recorder's office and it remained unrecorded until January 12, 1978, when S. M. Horman came upon the agreement in his files and took it to the Recorder's office where, upon determining that it had never been recorded, he then recorded it.

However, on March 15, 1977, a real estate exchange agreement was executed by six parties, namely, Sterling Furniture, Modern Enterprises, W. Meeks Wirthlin and wife, Prowswood, Auerbachs and defendant by which defendant agreed to and did convey its interest in the Valley Shopping Center to the Wirthlins, subject only to a first mortgage ($423,329), to a mortgage to Murray City that secured defendant's obligation to pave the street, and to "encroachments, easements and restrictions of record." The agreement required defendant to deposit by March 15, 1977 a preliminary title report by Associated Title Co. showing good and marketable title in Valley and a warranty deed conveying the Center to the Wirthlins. This requirement was met and the warrant deed contained the provision that the property was subject, among other things, to "easements, covenants, restrictions, rights of wa encroachments and reservations appearing of record or enforceable in law or equity."

Since the agreement between plaintiff and defendant had not been recorded as of March 15, 1977, and was not recorded until March 12, 1978, as stated supra, no mention thereof was made in the title report. The agreement of March 15, 1977, reserved $46,000 from the funds to be paid to defendant to cover the cost of paving the roadway to be built upon the land conveyed to Murray City, and which was in fact constructed and completed.

The warranty deed to the Wirthlins was recorded on March 15, 1977 by the title company handling the real estate exchange. Thereafter the Wirthlins sold their interest in Valley Shopping Center to Arnold Development who in turn sold it to G. G. Finlayson and Janet F. Griffin who owned the center at the time of trial.

At the time Horman recorded the agreement between the parties in March, 1978, he made no inquiry as to the then ownership status and thus did not know of the sale of the center by defendant to the Wirthlins. In 1980 the Horman property was conveyed to S. M. Horman, Jr., as trustee for his family and he then undertook to develop the property for business purposes.

Horman, Jr., obtained a building permit from Murray City about July 1, 1980, and commenced to build the outside walls with the intent to complete 20 interior units as lessees were obtained so each leased unit could be installed and completed in accordance with the desires of each lessee. The building permit records of Murray City left something to be desired, but minutes of a commission meeting dated May 1, 1980 reflected that Horman had explained that off-street parking for his building would be provided on a lot located on the south side of 4370 South Street, the street built pursuant to the agreement between the parties.

As Horman proceeded with the construction of the building the difficulty leading to the filing of this lawsuit began to take shape when Finalyson learned in some way of the apparent parking easement which resulted in a letter by his attorney dated September 30, 1980, to Arnold Development requesting an adjustment in the purchase price because of the reported easement. A copy of this letter was designated for Horman Construction Co. On November 17, 1980 Finlayson's lawyer wrote a letter to Horman Construction attaching a copy of a letter written by Associated Title Co. dated November 3, 1980, which expressed the view that because of the late recording of the agreement between plaintiff and defendant, any easement for parking granted therein was ineffective against the Wirthlins and the subsequent purchasers. By letter dated December 30, 1980, S. M. Horman responded thereto and continued to assert the easement was valid and discussed in detail the problems that would arise should the Horman business development lose its parking spaces.

In the months that followed Murray City issued a stop order on the construction; building plans were altered and off-street parking spaces were constructed on the Horman property but these were about 22 spaces short of meeting the Murray City ordinance requirements for parking; negotiations were undertaken by the Hormans with Finlayson to obtain spaces in the center; and leases were let based upon Murray City's approval of interior constructio for a 57% occupancy. The negotiations for parking in the center's parking lot between plaintiffs and defendant did not result in a successful conclusion so this lawsuit was filed March 16, 1981, an at the time of trial the occupancy allowance remained the same and the negotiations between Horman and Finlayson were still being pursued as they had been during the prior 3½ years.

Amended pleadings were filed from time to time resulting in a dismissal of the case against the Wirthlins, Arnold, Finlayson and Griffin. The filing of the Fourth Amended Complaint upon whic the case was tried was stipulated to upon the plaintiffs dropping their claims for relief based upon prior allegations of fraud and breach of an alleged oral promise by defendant's agent that he would record the agreement. The claims for relief set forth in th Fourth Amended Complaint were for an alleged breach of the agreeme between the parties in that defendant (1) failed to disclose the existence of the agreement to new purchasers and (2) failed to specifically mention the Horman interest in the center's property on the warranty deed conveying the property to the Wirthlins, thereby allegedly breaching defendant's contractual duty not to interfere with the parking rights granted under that agreement. It was alleged that refusal by subsequent owners to allow parking privileges resulted in damages of lost rents and a diminution in the value of plaintiffs' property.

Much evidence and testimony were presented during the trial relating to construction problems, to negotiations for parking spaces, efforts with Murray City to obtain variances including even a vacating of the street, and to damages. But the significant factual issue centered around the alleged breach of a contractual duty not to interfere with the parking rights under the contract.

The warranty deed by which defendant conveyed the shopping center property to the Wirthlins contained provisions that the conveyance was subject to the first mortgage, the performance mortgage to Murray City (also to a right of way over the north 15 feet which was the parcel deeded to Murray City for roadway purposes), and to "easements, covenants, restrictions, rights of way, encroachments and reservations appearing of record or enforceable in law or equity." Plaintiffs assert that the failure to specifically set out in that deed that the conveyance was also subject to the parking privileges under the contract was a breach of duty not to interfere.

The agreement had all the necessary requirements for recording -- acknowledged signatures and property description -- and it is thus readily apparent that had Horman recorded the agreement in March, 1976, after Clark signed it for defendant, it would have constituted notice to all that the contracted for parking rights were an encumbrance upon the property and would hav been included in the provisions of the quoted language set forth in the preceding paragraph. Horman has had long experience in the acquisition, construction, management, sales and leasing of real property and to him the necessity of recording the agreement to protect his interest in the parking facilities at the center must have been well known to him and understood by him. Had he done so, this lawsuit would never have been filed. Having failed to do so, can plaintiffs now shift the responsiblity to defendant for the problems and damages that followed?

While it may be true as alleged by plaintiffs that defendant had a duty not "to interfere" with the contractual rights of the plaintiffs, neither the sale of the property by defendant nor defendant's failure to either itself record the agreement nor to specifically mention the encumbrance in its deed to Wirthli constitutes an interference with plaintiffs' contract rights. The fact that the Wirthlins were bona fide purchasers for value without notice of the unrecorded contract was the determining factor in precluding plaintiffs from retaining the parking privileges provided for in the contract.

I find no duty upon the defendant to have recorded the agreement. In real estate transactions, it is a grantee's rights that are given protection by the recording statutes and that protection can only be obtained by the recording. I think the responsibility for doing so falls upon the grantee and such has long been the practice in real estate transactions. The law neither requires nor is it customary that a warranty deed conveying real property specifically list all of the valid, existing encumbrances of record. That is why title companies exist and that is why buyers and sellers both look to title reports to reveal such encumbrances of record.

There is no evidence in this case that defendant knew the agreement with plaintiff had not been recorded when defendant entered into the six-sided real estate exchange agreement under which defendant sold to the Wirthlins, nor is there any convincing evidence that defendant knowingly or intentionally failed to disclose the parking privilege encumbrance when that real estate exchange agreement was negotiated. As stated supra, both the exchange agreement and the warranty deed to the Wirthlins contained provisions that would have preserved the parking privilege had Horman promptly recorded the agreement. Plaintiffs abandoned their prior claim that defendant breached an oral agreement to record the agreement and indeed there was no implied duty to do so nor any obligation to make certain that Horman had done so.

I thus find no breach of duty by defendant under the agreemen and must enter a verdict against the plaintiffs and in favor of the defendant of no cause of action. Having so ruled, the issue of damages need not be further considered.

Counsel for defendant shall prepare appropriate Findings, Conclusions and Judgment unless the parties by written Stipulation otherwise agree as provided in Rule 52(c).

Dated this 25th day of July, 1984.

Bryant H. Croft
BRYANT H. CROFT
DISTRICT JUDGE (Retired)

ATTEST
H. DIXON HINDLEY
Clerk
By
Deputy Clerk

SEP 18 1984

Dist Court

JAMES S. JARDINE (A1647) and
CRAIG CARLILE (0571) of
RAY, QUINNEY & NEBEKER
Attorneys for Defendant
400 Deseret Building
79 South Main Street
P. O. Box 3850
Salt Lake City, Utah 84110-3850
Telephone: (801) 532-1500

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

S. M. HORMAN, as General Partner for Horman Construction Co., a Utah partnership and S. M. HORMAN, JR.,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiffs,	:	
v.	:	
S. SPENCE CLARK, as General Partner for Valley Shopping Center Associates, a Utah partnership,	:	Civil No. C-81-2129
Defendants.	:	

-----oo0oo-----

This matter came on before the Court for trial without a jury on July 9, 10 and 11, 1984. The plaintiff was represented by Raymond A. Hintze and the defendant was represented by James S. Jardine. The Court having considered the evidence, pleadings and oral arguments submitted by the parties, and having entered a Memorandum Decision, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In 1970, defendant acquired from S. M. Horman the Valley Shopping Center located at the northeast corner of the intersection of 4500 South and State Streets in Murray, Utah. Plaintiff retained an undeveloped tract of land lying north of and contiguous to the Valley Shopping Center.

2. In 1975, defendant petitioned Murray City to make a median cut in the traffic control island along State Street at 4370 South to afford access to the Valley Shopping Center by southbound traffic.

3. Murray City agreed to make the requested median cut only if defendant, plaintiff, and American Motors Company would all dedicate portions of their property for the construction of a road from State Street eastward to Fairbourne Avenue.

4. Defendant commenced negotiations with Horman and American Motors Company for a conveyance of a portion of their respective parcels of land to Murray City for the construction of said roadway.

5. The negotiations between plaintiff and defendant culminated in the execution of an agreement between plaintiff and defendant entitled "Parking Agreement"

6. The "Parking Agreement" contained the following provision:

> It is understood between both parties hereto that Property Management and/or Valley Shopping Center Assoc. will permit Horman or its assigns with parking privileges for Horman or Horman invitees or assigns to park on the parking lot in the rear of the Valley Shopping Center in any of the stalls which are used for public parking.

The agreement contained a legal description of the shopping center property.

7. The "Parking Agreement" was dated July 5, 1975, but was not signed by S. M. Horman for Horman Construction Company until September, 1975, and was not signed by defendant until March, 1976. Both signatures were acknowledged before a notary public.

8. The Agreement provided that Horman would deed to Murray City the south 35 feet of their parcel of land running east and west for about 460 feet and that defendant would deed to Murray City the north 15 feet of its property located between State Street and Fairbourne Avenue. American Motors Company agreed to deed the south 35 feet of its property running on State Street and contiguous to Horman's parcel on the west for about 150 feet. Murray City ageed to make the requested median cut in the traffic control island located on State Street.

9. Part of the agreement whereby all parties deeded land to Murray City included a provision that the Hormans would not be

required to pave the street running from State Street to Fairbourne Avenue.

10. Both plantiff and defendant had a signed and notarized copy of the "Parking Agreement".

11. Plaintiffs received everything agreed to in the Parking Agreement [illegible] and ~~enjoyed~~ the right to park on Valley Shoppinc Center property up until the time they were defeased of such rights through the recording of the Warranty Deed by W. Meeks Wirthlin, a bona fide purchaser.

12. The Parking Agreement was a recordable document under Utah Law and had all the necessary requirements for recording.

13. Upon final execution of the agreement, neither part had the agreement recorded in the County Recorder's Office and it remained unrecorded until January 12, 1978 when S. M. Horman took his copy to the Salt Lake County Recorder's office where, upon determining that it had never been recorded, he then recorded it.

14. On March 15, 1977, prior to the time the Parking Agreement was recorded by S. M. Horman, a Real Estate Exchange Agreement was executed by six parties, namely, Sterling Furniture, Modern Enterprises, W. Meeks Wirthlin and wife, Prowswood, Auerbachs and defendant, by which defendant agreed to and did convey its interest in the Valley Shopping Center to the Wirthlins, subject only to a first mortgage in an amount of $423,329.00, to a mortgage to Murray City that secured defendant's

obligation to pave the street, and subject to "encroachments, easements and restrictions of record." The six party exchange agreement required defendant to provide by March 15, 1977, a preliminary title report by Associated Title Companpy showing good and marketable title in Valley Shopping Center and a Warranty Deed conveying the center to the Wirthlins.

15. Defendant complied with the requirement to obtain and provide a preliminary title report and a Warranty Deed.

16. The Warranty Deed contained the provision that the property was subject, among other things, to "easements, covenants, restrictions, rights of way, encroachments and reservations appearing of record or enforceable in law or equity". No mention of the Parking Agreement was made in the title report because it had not been recorded as of March 15, 1977, the date of the title report.

17. The six party exchange agreement of March 15, 1977, reserved $46,000.00 from the funds to be paid to the defendant to cover the costs of paving the roadway running from State Street eastward to Fairbourne Avenue which had been conveyed to Murray City. The roadway was constructed and completed.

18. The Warranty Deed to the Wirthlins was recorded on March 15, 1977 by the title company handling the real estate exchange.

19. The Wirthlins were bona fide purchasers for value without notice of the unrecorded contract.

20. There is no evidence that defendant knew the Parking Agreement with plaintiff had not been recorded when defendant entered into the six party real estate exchange agreement under which defendant sold the Valley Shopping Center to the Wirthlins.

21. There is no convincing evidence that defendant knowingly or intentionally failed to disclose the parking privilege granted in the Parking Agreement when the real estate exchange agreement was negotiated.

22. The Wirthlins subsequently sold their interest in the Valley Shopping Center to Arnold Development who in turn sold it to G. G. Finlayson and Janet F. Griffin who owned the center at the time of trial.

23. At the time Horman recorded the Parking Agreement on January 12, 1978, he made no inquiry as to the ownership status and thus did not know of the sale of the center by defendant to the Wirthlins.

24. In 1980, the Horman property was conveyed to S. M. Horman, Jr., as trustee for his family.

25. Subsequent to receiving the subject property as trustee for his family, S. M. Horman, Jr. undertook to develop the property for business purposes.

26. On or about July 1, 1980, S. M. Horman, Jr. obtained a building permit from Murray City for a strip shopping center and commenced to build the outside walls with the intention to complete 20 interior units as leases were obtained so that each

leased unit could be installed and completed in accordance with the desires of each lessee.

27. The minutes of a Murray City commission meeting dated May 1, 1980 reflect that Horman had explained that off street parking for his building would be provided on the Valley Shopping Center property.

28. Sometime prior to September 30, 1980, Mr. Finlayson learned of Mr. Hormon's asserted parking easement on the Valley Shopping Center property. On September 30, 1980, Rick D. Higgins, attorney for G. G. Finlayson, wrote a letter to Arnold Development requesting an adjustment in the purchase price of the Valley Shopping Center because of Mr. Horman's alleged right to park on Valley Shopping Center property. A copy of this letter was sent to Horman Construction Company.

29. On November 17, 1980, Mr. Higgins wrote a letter on behalf of Mr. Finlayson to Horman Construction Company, attaching a copy of a letter written by Associated Title Company dated November 3, 1980, which expressed the view that because of the late recording of the agreement between plaintiff and defendant, any right for parking granted therein was ineffective against the Wirthlins and subsequent purchasers.

30. On December 30, 1980, S. M. Horman, Jr., wrote in response to Mr. Higgins' letter of November 17, 1980. That letter continued to assert that the parking rights were valid and

discussed in detail the problems that would arise should the Horman business development lose its parking spaces.

31. In April, 1981, Murray City issued a stop order on the construction of the strip center.

32. As a result of the stop order, Mr. Horman altered the building plans and made provisions for off street parking spaces on the property owned by him. However, the Horman property was approximately 22 parking spaces short of meeting the Murray City ordinance parking requirements for a building the size being constructed.

33. In August, 1981, Murray City issued 70% occupancy of the building. However, based on correspondence from Mr. Horman which mistakenly computed his parking spaces, Murray City approved 57% occupancy of the building based upon the available parking spaces.

34. The Hormans entered into negotiations with the Finlaysons beginning in December, 1980, for parking in the Valley Shopping Center's parking lot.

35. At the time of trial the 59% occupancy allowance granted by Murray City remained the same and the negotiations between Horman and Finlayson were still being pursued.

36. Horman has had long experience in the acquisition, construction, management, sales and leasing of real property and to him the necessity of recording the agreement to protect his

interest in the parking facilities at the Valley Shopping Center must have been well known and understood.

37. It is the custom and practice in real estate transactions that the grantee record the instrument granting him rights, titles and interest in real property.

38. It is not the custom or practice that a warranty deed conveying real property specifically list all of the valid, existing encumbrances of record.

39. Pursuant to a stipulation permitting the filing of the Fourth Amended Complaint upon which the case was tried, plaintiffs dismissed their claims alleging fraud and breach of an alleged oral promise by defendant's agent that he would record the agreement.

CONCLUSIONS OF LAW

1. The claims for relief set forth in the Fourth Amended Complaint were for an alleged breach of an implied contractual covenant to (1) disclose the existence of the Parking Agreement to the Wirthlins and (2) to specifically mention the Horman interest in the center's property on the Warranty Deed conveying the property to the Wirthlins. Plaintiff alleges that these two breaches constitute a violation of defendant's contractual duty not to interfere with the parking rights granted by the Parking Agreement.

2. Defendant complied with every express covenant in the Parking Agreement.

3. It is the custom and practice in real estate transactions that the grantee record the instrument granting him rights, title and interest in real property.

4. Defendant had no duty to record the Parking Agreement

5. The responsibility for recording falls upon Horman, who was the grantee.

6. In real estate transactions, it is the grantee's rights that are given protection by the recording statutes and that protection can only be obtained by recording the instrument.

7. The real estate exchange agreement and the Warranty Deed from defendant to the Wirthlins contained provisions that would have preserved the parking privilege had Horman promptly recorded the Parking Agreement.

8. The law does not require that a warranty deed conveying real property specifically list all of the valid, existing encumbrances of record.

9. There was no implied duty in the Parking Agreement for defendant to record that agreement.

10. Defendant did not breach any duty under the Parking Agreement, including but not limited to the duty not to interfere with rights granted by the agreement.

11. The sale of the property by defendant did not constitute an interference with plaintiff's contract right.

12. Defendant's failure to record the parking agreement did not constitute an interference with plaintiff's contract rights.

13. Defendant's failure to mention specifically the parking agreement encumbrance in its deed to Wirthlins did not constitute an interference with plaintiffs' contract rights.

14. There being no breach of a contractual duty, the issue of damages was not considered.

DATED this 11th day of September, 1984.

BRYANT H. CROFT
District Judge (Retired)

0619j

ATTEST
H. DIXON HINDLEY
Clerk
By
Deputy Clerk

1760 So State
SLC 84115.

Recorded JUL 12 [illegible] at 11:15
Request of Horman Constr
KATIE L. DIXON, Recorder
Salt Lake County, Utah
by [illegible] Deputy
Ref. Edward J. [illegible]

[illegible] A G R E E M E N T

THIS AGREEMENT, entered into this 7th day of July, 1975, by and between Valley Shopping Center Assiciates of Salt Lake County, State of Utah, hereinafter referred to as "Valley" and HORMAN CONSTRUCTION COMPANY, of Salt Lake County, State of Utah, hereinafter referred to as Horman.

WITNESSETH:

Valley is desirous of opening up a road through from State Street to Fairbourne Street.

Horman owns a parcel of land located immediately north of the Valley Shopping Center building running easterly to Fairbourne Street.

Horman hereby agrees to deed to Murray City the south strip of this land 35 feet wide running east and west approximately 460 feet.

Property Management owns the Valley Shopping Center located 4424 South Murray, UT Exhibit A next page [illegible] initials immediately south of the Horman property and the American Motors property and Valley Shopping Center agrees to also deed a 15 feet wide strip of land running from State Street on the west to Fairbourne on the east making a 50 foot right-of-way for a road from State Street through to Fairbourne.

It is also understood that Property Management will obtain a deed from American Motors. Herein American Motors will deed 35 feet of the south end of their property running from State Street east to the Horman property. Thus permitting a thoroughfare through from State Street easterly to Fairbourne.

It is understood between both parties hereto that Property Management and or Valley Shopping Center, Assoc. will permit Horman or its assigns with parking privileges for Horman or Horman invitees or assign to park on the parking lot in the rear of the Valley Shopping Center in any of the stalls which are used for public parking.

It is agreed by both parties hereto that each party has paid unto the other party $10.00 and other good and valuable consideration, a receipt of which is hereby acknowledged. It is hereby agreed and understood that Horman will not be required to pave the street.

Valley Shopping Center Associates

HORMAN CONSTRUCTION COMPANY
S. M. Horman, President

DEPOSITION
EXHIBIT
D #11
Horman, Sr.

Exhibit A

Description

BEG S 142.58 FT & E 906.21 FT FR W ¼ COR SEC 6, T 2S, R 1E S L M, N 0°05'30" E 617.24 FT M OR L; N 89°51' E 572.28 FT; S 0°05'30" W 200.32 FT M OR L; S 89°51' W 165 FT; N 0°05'30" E 35.42 FT; S 89°51' W 54.51 FT; S 0°05'30" W 285.37 FT; N 88°16'55" [illegible] 126.27 FT; N 89°09' W 78 FT; N 0°05'33" E 29.78 FT; S 89°51' W 148.56 FT TO BEG 4.69 AC M OR L

ATTEST:

STATE OF UTAH)
:ss.
County of Salt Lake)

On this [illegible] day of [illegible], 1975, personally appeared before me [illegible], one of the signers of the foregoing instrument, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC
Residing at: Salt Lake City

My Commission Expires:
[illegible]

ATTEST:

STATE OF UTAH
:ss.
County of Salt Lake)

On this [illegible] day of [illegible], 19[illegible], personally appeared before me [illegible], one of the signers of the foregoing instrument, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC
Residing at: [illegible]

My Commission Expires:

WHEN RECORDED, MAIL TO:

[illegible]

....

....

.... Space Above This Line for Recorder's Use

WARRANTY DEED

(Special)

VALLEY SHOPPING CENTER ASSOCIATES, a Limited Partnership grantor

of Salt Lake City, Utah hereby

CONVEY AND WARRANT against all claiming by, through or under it

to W. MEEKS WIRTHLIN and BETTY JO G. WIRTHLIN, his wife, as tenants in common

grantees

of Salt Lake City, Utah for the sum of

TEN DOLLARS and other good and valuable consideration ~~DOLLARS~~,

the following described tract of land in Salt Lake County,

State of Utah:

SEE ATTACHED SCHEDULE A

Deposition Ex. No 8
Witness Fotheringham
Date 10-20-81
[illegible]
[illegible]

WITNESS, the hand of said grantor, this 15th day of March, A. D. 19 77

Signed in the Presence of

VALLEY SHOPPING CENTER ASSOCIATES

BY: ....
S. SPENCE CLARK, General Partner

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 15th day of March A. D. 1977 personally appeared before me S. SPENCE CLARK who being by me duly sworn did say that he is a General Partner of VALLEY SHOPPING CENTER ASSOCIATES, a Limited Partnership, and that the foregoing instrument was signed in behalf of said Limited Partnership by authority of the Partnership Agreement of said Limited Partnership, and said S. SPENCE CLARK acknowledged to me that said Limited Partnership executed the same.

Addendum A-24

NOTARY PUBLIC
Residing at: Salt Lake City, Utah

Commission Expires: 10/13/80

Beginning at a point on the East line of State Street at a point South 142.48 feet and East 906.21 feet (old deed ties would make this South 156.42 feet and East 917.40 feet) from the West quarter corner of Section 6, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 0°05'30" East along said East line 432.24 feet; thence North 89°51' East 572.28 feet to the center of Fairbourne Street; thence South 0°05'30" West along the center of said Street 217.52 feet; thence South 89°51' West 165.00 feet; thence North 0°05'30" East 35.42 feet; thence South 89°51' West 54.51 feet; thence South 0°05'30" West 285.3 feet to the North line of State Highway (Project US-0144 (7); thence North 88°16' West along said North line 126.27 feet; thence North 89°09' West along said North line 78.00 feet; thence North 0°05'30" East 29.78 feet; thence South 89°51' West feet to the point of beginning.

Subject to a Right of Way over the North 15 feet thereof, so long as said Right o Way does not conflict with the existing building.

EXCEPTING THEREFROM: Beginning at a point 1003 feet East and 188 feet North of t Southwest corner of the Northwest quarter of Section 6, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence South 14 feet; thence East 24 feet; thence North 14 feet; thence West 24 feet to the point of beginning.

Together with a Right of Way through a 10 foot alley adjacent to said propert with ingress and egress to and from the same and for the laying of pipes undernea the surface.

This conveyance is made and accepted subject to a Trust Deed in favor of PACIFIC MUTUAL LIFE INSURANCE COMPANY recorded January 26, 1967 in Book 2525 at Page 473 of Official Records, having an unpaid principal balance of $423,329.92 as of March 1, 1977.

This conveyance is also made and accepted subject to a Performance Mortgage in fav of MURRAY CITY CORPORATION recorded November 22, 1976 in Book 4412 at page 394 of Official Records.

Subject to easements, covenants, restrictions, rights of way, encroachments and reservations appearing of record or enforceable in law or equity and taxes for the year 1977 and thereafter.

Utah Code Ann. § 57-1-6 (1953):

> Recording necessary to impart notice -- Operation and effect -- Interest of person not named in instrument. Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgement, certification or record, and as to all other persons who have had actual notice. Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the grantor or grantors; but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest.

Utah Code Ann. § 57-1-12 (1953):

Form of warranty deed -- Effect. Conveyances of land may be substantially in the following form:

WARRANTY DEED

__________________________ (here insert name), grantor, of __________________ (insert place of residence), hereby conveys and warrants to __________ (insert name), grantee, of ___________ (insert place of residence), for the sum of _________ dollars, the following described tract __________ of land in __________ County, Utah to wit: (here describe the premises).

Witness the hand of grantor this ____ day of _______ 19__.

Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging, with convenants from the grantor, his heirs and personal representatives, that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free from all encumbrances; and that the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land.

SUFFOLK AND NANTUCKET.

EDWARD ADAMS *versus* WILLIAM CUDDY.

The owner of a tract of land in Boston conveyed a portion of it, describing such portion by metes and bounds; subsequently, he executed another deed, conveying "all the right and title to the land I have in Boston," to a second grantee, which was registered before the prior deed. It was *held*, that the portion of land described in the prior deed did not pass to the second grantee, as coming within the general description of the estate conveyed in the subsequent deed.

In an action between parties claiming respectively under a prior deed containing covenants of seisin and warranty, and a subsequent deed which was registered first, not containing any covenant, it was *held*, that the grantor, whose original title was good and indefeasible, was a competent witness to prove that the subsequent grantee had notice of the prior conveyance.

If a grantee takes with notice of a prior unregistered deed, and conveys to a second grantee with like notice, the second grantee, as well as the first, is precluded from setting up the subsequent deed against the prior unregistered deed.

TRESPASS *quare clausum*. The defendant pleaded soil and freehold in himself; and issue was taken on that fact.

Upon a case stated it appeared, that the *locus in quo* was parcel of a larger tract of land in South Boston, which was set off to Sarah Baker, wife of William Baker, upon the division of the estate of her father, James Blake, deceased, and that both parties claim title from her.

On December 21, 1807, William Baker executed a deed with covenants of seisin and warranty, purporting to convey the *locus in quo* to Jonathan Simonds in fee, and describing it accurately by metes and bounds. The wife of Baker joined in the deed, according to the following clause: "In witness whereof I the said William Baker, and my wife, in consideration of one dollar paid to me by said Simonds, do forever quit my right and fee in said premises, and we have hereto set our hands and seals," &c. This deed was not recorded till June 3, 1808. On June 17, 1808, Simonds conveyed the same land to the plaintiff, and the deed was recorded on the same day.

On March 24, 1808, William Baker and wife executed a deed to William's father, Allen Baker, containing the following clauses, to wit: "I, William Baker &c. and Sarah Baker, my wife, in her right, for in consideration of six hundred dollars paid me by my honored father, Allen Baker &c., I do, by these presents, the receipt acknowledge, and release and forever quitclaim all the right and title to the land I have in South Boston, so called, formerly a part of the estate of James Blake, housewright, deceased : — And I, Sarah Baker, for myself, for the above sum mentioned do, for myself, forever release and forever quitclaim all my right and title to my honored father aforesaid, together with my right of dower, the receipt whereof we do hereby acknowledge, grant, bargain, sell and convey unto our honored father aforesaid, to him, his heirs " &c. This deed contained no covenant. It was recorded on March 28, 1806.

On the decease of Allen Baker, Rebecca Baker, his widow, was appointed administratrix of his estate, and being duly authorized to sell his real estate, for the payment of his debts, conveyed to Calvin Baker, by a deed dated March 20, 1818, and recorded the next day, all the interest of the deceased in a certain tract of land in South Boston, described by metes and bounds. This tract was a portion of the land set off to Sarah Baker and included the *locus in quo*. Calvin Baker, by a deed dated November 8, 1821, and recorded the next day, conveyed the same tract to the defendant.

The depositions of William and Sarah Baker, who were both living at the time of the supposed trespass, were put into the case, for the purpose of showing, that at the time when they conveyed to Allen Baker, he had notice of the prior deed to Simonds.

It was agreed, that if the plaintiff was entitled to recover, the defendant should be defaulted, and judgment rendered for the plaintiff for 30 dollars damages and costs ; otherwise the plaintiff was to become nonsuit.

The case was argued in writing by ***D. A. Simmons***, for the plaintiff, and ***Rand*** and ***Fiske***, for the defendant.

March 11th

Shaw C. J. delivered the opinion of the Court. The question between these parties is a question of title only, it being admitted that the defendant has done acts, which if he cannot justify on the ground of title, amount to a trespass

The first question is, upon the effect of the deed of William Baker and wife to Simonds. It is certainly a very imperfect, illiterate, and ill drawn conveyance. It is contended, that there are no words of grant or conveyance on the part of the wife ; and this certainly seems to be the case, if, according to the natural and grammatical construction of the language, the words are those of the husband only. But we do not consider that the Court is called on to decide what *quantum* of estate passed by this deed. If any estate passed and that continued till the time of the alleged trespass, it is sufficient for this action.

The husband was seised in right of his wife. It does not appear by the facts, whether there were children of the marriage ; if there were, the husband had an inchoate tenancy by the curtesy, which was an estate for his own life ; but if there were not, he had a freehold, determinable upon the contingency of surviving his wife. In either way of considering it, he had a seisin ; and such estate as he had passed by his deed to his grantee. It appears by the depositions in the case, that William Baker and his wife were both living, when the supposed trespass was committed, and therefore that the plaintiff had a title at that time sufficient to enable him to maintain the action.

But another ground of defence more confidently relied upon, is, that before the above deed was registered, the same estate was conveyed to Allen Baker, father of William, through whom the defendant claims, without notice of the prior conveyance, and the subsequent deed was first registered ; and so that the defendant has the better title ; and the dates of the execution and registry of the respective deeds would seem to maintain this ground.

To this the plaintiff makes two answers, first, that the subsequent deed from William Baker and wife, to his father Allen Baker, did not include the land before conveyed to Simonds ; and secondly, that Allen Baker, the grantee, had notice of the prior conveyance to Simonds.

That the administratrix of Allen Baker supposed that the deed from William to his father embraced the premises, is manifest from the fact, that she included that parcel in her deed to Calvin Baker, made in pursuance of a sale under a license ; and Calvin Baker, in like manner, included it in his deed to the defendant. But if the estate did not vest in Allen Baker, then his administratrix had no authority to convey it, and her deed was void. And the Court are all of opinion, that the deed of William Baker and wife to his father, did not embrace the premises. This deed is quite as illiterate and informal, as the one above remarked upon. It is however, the deed of William Baker and his wife, and all the clauses of grant and release, are the language of both, and bind the estate of both; and informal as it is, it is to have its legal effect. The deed contains no covenants, of any kind. The words, "grant, bargain, sell and convey," are contained, but they come after the description, the words preceding it being "release and quitclaim." But without placing any reliance upon these informalities, we rest our opinion upon this; that examining the deed most critically, it does not purport to convey any land specifically, but only "all the right and title to the land I have in South Boston, formerly a part of the estate of James Blake, housewright, deceased"; and then afterwards the wife adds, "all my right and title to my honored father aforesaid"; probably the word "estate" of her father's was omitted by mistake. Now, we think the effect of conveying all the right and title I have, by fair construction, means all that has come to me and that I have not legally parted with. But the deed to Simonds, whether registered or not, gave a good title as against the grantor and his heirs. This therefore he had legally parted with, and it did not come within the general description of the estate conveyed. Were it construed otherwise, the grantors might in effect commit a fraud, without intending or even being conscious of it. Where a grantee takes by so indefinite a description as the right which the grantor has, he must take the risk of his grantor's right.

But upon the other ground, we are strongly inclined to the opinion, that the plaintiff has the better title. We do not perceive, that William Baker and Sarah Baker were not competent witnesses. In the deed to his father, there is no covenant. In that to Simonds there are covenants of seisin and warranty. It is agreed, that William Baker and his wife were then seised and had a good and indefeasible title. Should Simonds or his grantee lose their title in consequence of not registering their deed, the warrantor would

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not be liable on his warranty for such defect.—There seems to be no case in which Baker can be liable on his warranty; and if so, he is disinterested and a competent witness.

The effect of his testimony is, that when he conveyed to his father, the latter had notice of his prior conveyance to Simonds. If such was the case, he could never set up his title, though his deed was first registered, against the prior unregistered deed to Simonds. And though if Calvin Baker and the defendant had taken a deed from Allen, without notice of such defect in his title, the title might be indefeasible in them, yet this principle would not apply here, as they did not take a deed of him, but of his administratrix, who could only sell such estate as he had. But what is more important, before the defendant took his deed of Calvin Baker or the latter took his of the administratrix, the deeds from William Baker to Simonds and from the latter to the plaintiff, had been recorded; which was constructive notice to them. Now I take the rule to be, that if a grantee takes with notice of a prior unregistered deed, and he conveys to a second grantee, with like notice, the second, as well as the first, is precluded from setting up the subsequent deed, against the prior unregistered deed.

Defendant defaulted